BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEOPOLDO RANGEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,040,844
THONEN CONSTRUCTION COMPANY	)	
Respondent	)	
AND	)	
	)	
STATE FARM FIRE & CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the November 24, 2008, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

This is a claim for an August 7, 2007, accident in which claimant alleges he injured his back. In the preliminary hearing Order the Judge found the accident was compensable under the Workers Compensation Act. The Judge held:

> The Claimant left Wichita in a company truck for Manhattan, Kansas for a construction project where he stayed in a hotel overnight before leaving for a construction project in Junction City. Claimant was involved in a traffic accident before arriving. The Court finds that the accident arose out of and in the course of his employment. The Respondent is ordered to designate an Authorized Treating Physician[.][1]

Respondent contends the Judge erred. Respondent argues the Board should find the "going and coming rule" set forth in K.S.A. 2007 Supp. 44-508(f) bars this claim as claimant was merely commuting to work when the accident occurred. Citing the 2001

[1] ALJ Order (Nov. 24, 2008).

Butera[2] decision, respondent argues that claimant established a temporary residence in a motel room in Manhattan, Kansas, and, therefore, his accident occurred during his morning commute to the Junction City, Kansas, job site. In short, respondent requests the Board to reverse the preliminary hearing Order and deny claimant's request for benefits.

Claimant did not file a brief with the Board and, therefore, the Board is without the benefit of his analysis of the facts and related legal principles.

The only issue before the Board on this appeal is whether claimant's accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the record compiled to date and respondent's arguments, the undersigned Board Member finds as follows:

Respondent is a Wichita, Kansas, company that does concrete work as a subcontractor. On August 6, 2007, claimant rode with his crew in a company truck from Wichita to Manhattan, Kansas, to work on a job. That night they stayed in Manhattan. The next morning, August 7, 2007, as claimant's supervisor was driving the crew to a new job site in Junction City, Kansas, the driver made an illegal U-turn and collided with a car. Claimant's supervisor, Michael Thonen, testified in part:

> Q. (Mr. Seiwert) And the accident report talks about making -- well, it indicates that the driver 1, which I assume is you, had made a wrong turn and attempted a U-turn. Was that what -- is that accurate?
>
> A. (Mr. Thonen) Yeah, I saw a sign that directed us to the job, and I was, oh, there it is. I was kind of confused with the directions the superintendent had given me, and I made a turn that was -- made an illegal turn.
>
> Q. Okay. Is that when the accident happened?
>
> A. Yes.[3]

The undersigned finds the accident occurred as a result of Mr. Thonen's negligence, which is imputed to respondent.

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[2] *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[3] P.H. Trans. at 24, 25.

As indicated above, respondent maintains the accident is not compensable under the "going and coming rule" of the Workers Compensation Act as claimant was merely on his way to work. The Act provides:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, **the proximate cause of which injury is not the employer's negligence**. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .[4] (Emphasis added.)

Because the accident occurred as a result of respondent's negligence, the bar to compensability as set forth in the "going and coming rule" does not apply. In the 2003 *Butera*[5] decision, the Kansas Court of Appeals specifically addressed the legal effect of the above-quoted language when it said:

> Although **K.S.A. 2001 Supp. 44-508(f) allows for compensation where an employee is injured while traveling to or from work and the injury is proximately caused by the employer's negligence**, this provision is entirely separate from the premises and special hazard exceptions.[6] (Emphasis added.)

Consequently, claimant's accident is compensable.

In summary, the Judge correctly ruled that claimant's accident was compensable under the Workers Compensation Act. Therefore, the preliminary hearing Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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[4] K.S.A. 2007 Supp. 44-508(f).

[5] *Butera v. Fluor Daniel Constr. Corp.*, 31 Kan. App. 2d 108, 61 P.3d 95, *rev. denied* 275 Kan. 963 (2003).

[6] *Id.* at 113.

[7] K.S.A. 44-534a.

by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the November 24, 2008, preliminary hearing Order entered by Judge Klein.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge